No. 92-6073

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the civil forfeiture of property valued at $38,000 that was used by the owner for drug trafficking violated the Cruel and Unusual Punishment Clause and the Excessive Fines Clause of the Eighth Amendment.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-6073

RICHARD LYLE AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A8, is reported at 964 F.2d 814.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1992. A petition for rehearing was denied on July 2, 1992. The petition for a writ of certiorari was filed on September 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the District of South Dakota, the government filed a civil forfeiture action against the instant properties under 21 U.S.C. 881(a)(4) and 881(a)(7). The

district court granted summary judgment for the government. The court of appeals affirmed. Pet. App. A1-A8.

1. Petitioner owned an automobile body shop and mobile home in Garretson, South Dakota. On July 13, 1990, at the body shop, petitioner agreed to sell cocaine to Keith Engebretson. Petitioner left the body shop, went to his mobile home, returned to the body shop, and sold Engebretson two grams of cocaine. The next day, state law enforcement agents executed search warrants at the body shop and the mobile home. The agents seized a .22 caliber revolver, some marijuana, and $3,300 in cash from the body shop, as well as other items that are employed in selling or using drugs, such as a piece of mirror, a small white tube, and a razor blade. The agents seized a small baggie of cocaine, a bundle of cocaine marked "1/2," a baggie of marijuana, an electronic Ohaus scale, and $660 in twenty dollar bills from the mobile home. Petitioner subsequently pleaded guilty in state court to one count of possession with intent to distribute cocaine. Pet. App. A2.

2. The United States filed a civil forfeiture complaint against the body shop and the mobile home under 21 U.S.C. 881(a)(4) and 881(a)(7). The government moved for summary judgment, and supported its motion with an affidavit describing the Engebretson sale, the search of the properties, and petitioner's guilty plea in state court. Petitioner filed a motion stating that the gun found in his body shop was used to shoot birds and that he received no money from the Engebretson sale. The district court granted summary judgment for the government. Pet. App. A2-A3.

The court of appeals affirmed. First, it held that the district court properly entered summary judgment for the government. It stated that the government's affidavit showed that Austin was dealing drugs from his body shop and mobile home and that Austin's affidavit did not dispute any essential elements of the government's claim. Pet. App. A3-A4.

The court also held that the forfeiture of the instant properties did not violate the Eighth Amendment's ban on cruel and unusual punishments or excessive fines. Although the court was concerned that the penalty was "too high * * * in relation to the offense committed," Pet. App. A7, the Court held that the Eighth Amendment's proportionality requirement did not apply in a civil forfeiture case because the government was proceeding against property in rem, and "the focus of an in rem action is the guilt or innocence of the property; the owner's culpability apparently is therefore not a factor." Pet. App. A6.

ARGUMENT

Petitioner claims (Pet. 8-10) that the civil forfeiture in this case violated either the Cruel and Unusual Punishment Clause or the Excessive Fines Clause of the Eighth Amendment.

As an initial matter, because civil forfeiture statutes have long been regarded as inherently remedial in purpose, see United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362-366 (1984); One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 237 (1972), it is doubtful that the Eighth Amendment has any application to civil forfeitures. The Eighth Amendment is

designed to regulate punishment meted out as a result of a criminal conviction. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989) ("Given that the Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments."); Ingraham v. Wright, 430 U.S. 651, 664 (1977) ("the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government"). The weight of authority from the courts of appeals recognizes that Congress intended the forfeiture statute at issue in this case, 21 U.S.C. 881, to serve civil, remedial purposes, such as "removing the incentive to engage in drug dealing by denying drug dealers the proceeds of illgotten gains, stripping the drug trade of its instrumentalities, and financing Government programs designed to eliminate drug trafficking." United States v. Santoro, 866 F.2d 1538, 1544 (4th Cir. 1989). Since it was neither intended to be nor is a primarily punitive provision, it is not subject to the strictures of the Eighth Amendment. United States v. One Parcel of Real Property, 960 F.2d 200, 206-207 (1st. Cir. 1992); United States v. Certain Real Property Commonly Known as 6250 Ledge Road, Egg Harbor, WI, 943 F.2d 721, 727 (7th Cir. 1991); United States v. Real Property & Residence at 3097 S.W. 111th Avenue, 921 F.2d 1551, 1557 (11th Cir. 1991); United States v. One 107.9 Acre Parcel of Land Located in Warren Township, Bradford Co., Pa., 898 F.2d 396, 400-401 (3d Cir. 1990); United States v. Tax Lot 1500, 861 F.2d 232, 233-235 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989); United States v. Santoro, 866 F.2d 1538 at 1543-1544; cf. United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 540-545 (5th Cir. 1987) (Section 881 a civil, remedial provision and not subject to Ex Post Facto Clause), cert. denied, 485 U.S. 976 (1988); United States v. McCaslin, 959 F.2d 786, 788 (9th Cir.) (civil forfeiture statutes are inherently remedial and therefore do not implicate the Double Jeopardy Clause), cert. denied, 113 S. Ct. 382 (1992).[1]

In United States v. Certain Real Property and Premises, 954 F.2d 29 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992), the Second Circuit stated that civil forfeitures may violate the Eighth Amendment. The Second Circuit relied on United States v. Halper, 490 U.S 435 (1990), in which this Court held that a civil penalty may be found to violate the Double Jeopardy Clause in the "rare case" in which the penalty is "overwhelmingly disproportionate to the damages" caused by the defendant. Id. at 449.[2] In the Second

---

[1] Petitioner's reliance (Pet. 8) on United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987), is misplaced because Busher involved a criminal forfeiture provision, 21 U.S.C. 853, not the civil forfeiture statute here. For the same reason, this case need not be held for this Court's decision in Alexander v. United States, No. 91-1526, cert. granted, June 29, 1992. That case presents the question whether a criminal forfeiture under the RICO statute, 18 U.S.C. 1963, violated the Eighth Amendment. There is no dispute in Alexander that criminal forfeitures under the RICO statute can be examined under the Eighth Amendment. See Br. for the United States 35 n.18.

[2] In Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989), the Court stated that "[its] opinion in Halper implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns." 492 U.S. at 275 n.21. The Court did not, however, decide that issue, nor did it specifically address the question whether the Eighth Amendment applies to civil forfeitures, as opposed to punitive damages.

Circuit's view, the same analysis would apply to a claim that a civil forfeiture violated the Eighth Amendment. Certain Real Property, 954 F.2d at 35.

Even if the Second Circuit were correct that civil forfeitures are subject to Eighth Amendment analysis, the forfeiture in this case is constitutional. In Certain Real Property, the Second Circuit found that it was not grossly disproportionate to require forfeiture of a residence valued at $145,000, of which $68,000 represented the owner's equity interest, where the owner had used the residence twice to sell cocaine with a total weight of 2 1/2 grams for a total price of $250. The court noted that federal law and the laws of many States treat drug offenses seriously; the court's sampling indicated that a sale of the quantity at issue in Certain Real Property could subject the offender to terms of imprisonment of up to 20 years and fines of up to $1,000,000. Cf. Harmelin v. Michigan, 111 S.Ct. 2680 (1991) (mandatory life sentence without parole for possession of 672 grams of cocaine did not violate the Eighth Amendment). In that light, the Second Circuit held that "the imposition of a $68,000 fine * * *, while large, is not a grossly disproportionate punishment within the meaning of Eighth Amendment jurisprudence." 954 F.2d at 39.

Petitioner's offenses are analogous to those at issue in Certain Real Property. Petitioner obtained two grams of cocaine from his mobile home and sold it at his body shop. The subsequent searches of the properties showed that Austin stored drugs in both places for resale. The value of the forfeited properties is

approximately $38,000. Gov't. C.A. Brief at 18. If it were viewed as punishment, the forfeiture of the instant properties would therefore have been less severe than the "punishment" imposed as a result of the forfeiture in Certain Real Property. Accordingly, this case would have been decided the same had it arisen in the Second Circuit, and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney

DECEMBER 1992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RECEIVED
HAND DELIVERED
DEC 28 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RICHARD LYLE AUSTIN, PETITIONER)
)
V) NO. 92-6071
)
UNITED STATES OF AMERICA)

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by mail on December 28, 1992.

RICHARD L. JOHNSON
101 SOUTH MAIN AVENUE
SUITE 305
SIOUX FALLS, 57102

Kenneth W. Starr/cs
KENNETH W. STARR
Solicitor General

December 28, 1992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RECEIVED
HAND DELIVERED
DEC 28 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ARTHUR HILL, PETITIONER)
)
V) NO. 92-6095
)
UNITED STATES OF AMERICA)

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by mail on December 28, 1992.

TED C. FARMER
4300 PENOBSCOT BUILDING
DETROIT, MI 48226

Kenneth W. Starr/cs
KENNETH W. STARR
Solicitor General

December 28, 1992

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2382SDSF

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
One Parcel of Property Located at	*	
508 Depot Street, etc., et al.,	*	
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. Judge McMillian and Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

July 2, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2382SD

United States of America, Appellee, v. One Parcel of Property Located at 508 Depot Street, Garretson, Minnehaha County, South Dakota, with all appurtenances and improvements thereon; HMET Mobile Home 1972 with Serial Number 0356509G, with appurtenances and improvements thereon; Defendants-Appellants, Richard Lyle Austin, Claimant-Appellant.	*	Appeal from the United States District Court for the District of South Dakota.

Submitted: March 13, 1992

Filed: May 20, 1992

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and LOKEN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Richard Lyle Austin appeals the district court's[1] order granting the government's motion for summary judgment in this civil forfeiture action. We affirm.

[1]The Honorable John B. Jones, United States District Judge for the District of South Dakota.

I. BACKGROUND

On June 13, 1990, Keith Engebretson met Austin at Austin's auto body shop and agreed to purchase some cocaine. After reaching an agreement with Engebretson, Austin left the body shop, went to his mobile home, and then returned to the body shop, at which time he sold Engebretson two grams of cocaine. The next day, state law enforcement officers executed search warrants at the body shop and at the mobile home. The search of the body shop uncovered a twenty-two caliber revolver, some marijuana, and $3,300 in cash. Additionally, a piece of mirror, a small white tube, and a razor blade were found on top of a barrel in the back of the shop. The search of the mobile home revealed an electronic Ohaus scale, a small baggie of cocaine, and $660 in twenty dollar bills. The search also revealed a bindle of cocaine marked "1/2" as well as a baggie of marijuana.

Austin pleaded guilty in state court to one count of possession of cocaine with intent to distribute. Shortly thereafter, the federal government initiated civil forfeiture proceedings against Austin's body shop and mobile home pursuant to 21 U.S.C. §§ 881(a)(4) and 881(a)(7) (1988).[2] Austin resisted the government's attempt to seize his property. The government moved for summary judgment and supported its motion with an affidavit describing the Engebretson sale, the search of the property, and Austin's subsequent plea and conviction. Austin submitted an affidavit stating, in relevant part, that the gun found in his body

[2]21 U.S.C. § 881(a)(4) permits the government to seize "[a]ll conveyances . . . which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of" illegal drugs or drug paraphernalia. Section 881(a)(7) authorizes forfeiture of "[a]ll real property . . . in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" certain drug related crimes.

shop was used to shoot sparrows and that he received no money from Engebretson on June 13, 1990. The district court granted the government's motion for summary judgment and this appeal followed.

II. DISCUSSION

A. Summary Judgment

"In reviewing a district court's grant of summary judgment, this court applies the same standard as the district court and views the facts in the light most favorable to the nonmovant, giving it the benefit of all reasonable inferences to be drawn from the facts." Woodsmith Publishing Co. v. Meredith Corp., 904 F.2d 1244, 1247 (8th Cir. 1990). Summary judgment is appropriate only if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Mandel v. United States, 719 F.2d 963, 965 (8th Cir. 1983).

In the context of a civil forfeiture proceeding, the government carries the initial burden of establishing probable cause; that is, it must "establish only that reasonable grounds exist to believe that the [property was] used or intended to be used for prohibited purposes." One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759, 761 (8th Cir. 1986). The necessary level of proof is greater than mere suspicion, but is less than prima facie proof. United States v. Premises Known as 3639-2nd Street N.E., 869 F.2d 1093, 1095 (8th Cir. 1989). Once the government meets this burden, "the burden shifts to the party opposing forfeiture to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture or that a defense to forfeiture is applicable." Id. The claimant cannot meet this burden by simply resting on his or her pleadings; instead, the claimant "must set forth specific facts by affidavits or otherwise showing that there is a genuine issue for trial." One

Blue 1977 AMC Jeep, 783 F.2d at 762. "If unrebutted, a showing of probable cause alone will support forfeiture." Id. at 761.

In the present case, the government met its initial burden. The affidavit offered to support the summary judgment motion demonstrated reasonable grounds to believe both the mobile home and the body shop were used to facilitate illegal drug activity. The body shop was used as a place to meet a prospective customer, conduct negotiations, and complete a drug transaction. The affidavit also tends to support the inference that the mobile home was used as a place to store drugs. The character of these activities constitutes a sufficient connection with the prohibited conduct to enable the government to meet its initial burden.

Thus, the burden shifted to Austin. Austin's affidavit does not address, much less rebut, the essential elements of the government's affidavit. Even crediting Austin's claims that the revolver was used to shoot birds and that Engebretson did not pay any money at the time the drugs were transferred, Austin's affidavit does not dispute the government's claim that Austin sold drugs at the body shop. Similarly, Austin does not counter any of the facts tending to demonstrate the mobile home was used to store drugs.[3] Having failed to carry his burden, and having failed to raise any genuine factual issues, we conclude there were no material facts in dispute and summary judgment in favor of the government was appropriate.

[3]Austin does contend the amount of drug activity on these premises was, at best, minimal. He also points out the property represents a significant portion of his limited wealth. However, these arguments are not relevant in determining whether there was a connection or nexus between the property and the illegal conduct. Premises Known as 3639-2nd Street, 869 F.2d at 1096.

B. Eighth Amendment

Austin contends the provisions of § 881 are unconstitutional as applied to him because the seizure of his business and home violates the Eighth Amendment. The government contends the Eighth Amendment does not apply because this is a civil forfeiture action. We reluctantly agree with the government. We say "reluctantly" because we believe that the principle of proportionality is a deeply rooted concept in the common law as stated and described in Solem v. Helm, 463 U.S. 277, 284, 290-92 (1983), and that as a modicum of fairness, the principle of proportionality should be applied in civil actions that result in harsh penalties. However, we are restrained from so holding because of the decisions in prior cases on this issue hereinafter discussed.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Austin contends the district court should have conducted a proportionality analysis as required by Solem to determine whether the value of the property forfeited was "grossly disproportionate" to the illegal drugs located, and the illegal activity occurring, on the property.[4] However, the nature of a civil forfeiture proceeding renders the Eighth Amendment's proportionality analysis inappropriate.

A civil forfeiture is not an action in personam; instead, it is an action in rem. Because the government is proceeding against the "offending" property, the guilt or innocence of the property's

[4]In Harmelin v. Michigan, 111 S. Ct. 2680 (1991), one plurality of the Court expressed a desire to overrule Solem, while a majority of the Court either declined to overrule Solem or explicitly approved of Solem. See United States v. Johnson, 944 F.2d 396, 408-09 (8th Cir.) (discussing the individual Justices' views), cert. denied, 112 S. Ct. 646 (1991). Nothing in this opinion should be construed as addressing Harmelin's effect on Solem.

owner is constitutionally irrelevant, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-87 (1974); yet Austin seeks, under the guise of proportionality review, to have the district court consider the seriousness of his illegal conduct and other matters relating to his culpability vis-a-vis the forfeiture of his property. We are constrained to agree with the Ninth Circuit that "[i]f the constitution allows in rem forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures . . . ." United States v. Tax Lot 1500, 861 F.2d 232, 234 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989). The focus in an in rem action is the guilt or innocence of the property; the owner's culpability apparently is therefore not a factor.[5]

In addition to adopting the Ninth Circuit's analysis, we agree with its observation that it appears incongruous to "require[] proportionality review for forfeitures when the government proceeds in personam, but not when the government proceeds in rem." Id. Legal niceties such as in rem and in personam mean little to individuals faced with losing important and/or valuable assets. United States v. Twelve Thousand, Three Hundred Ninety Dollars, 956 F.2d 801, 808-09 (8th Cir. 1992) (Beam, J., dissenting). We do not condone drug trafficking or any drug-related activities; nonetheless, we are troubled by the government's view that any

[5]We decline to follow the analysis employed in United States v. One 107.9 Acre Parcel of Land, 898 F.2d 396, 400-01 (3d Cir. 1990) and United States v. Santoro, 866 F.2d 1538, 1543-44 (4th Cir. 1989) because those cases utilized a framework designed to distinguish between criminal and civil proceedings. We are not convinced application of the Eighth Amendment depends solely upon whether the statute is classified as criminal or civil. See Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 263-64 (1989) ("[W]e need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.").

property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction. A case supporting Austin's position could be made on the bases of the history of the Eighth Amendment as set out in Browning-Ferris, 492 U.S. at 266:

> The Eighth Amendment clearly was adopted with the particular intent of placing limits on the powers of the new Government. "At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights." Ingraham v. Wright, 430 U.S. at 666 (footnote omitted). . . . Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its "prosecutorial" power, not concern with the extent or purposes of civil damages.

In this case it does appear that the government is exacting too high a penalty in relation to the offense committed, but we are limited by the technical legal distinctions regarding in personam and in rem actions, together with the clear court decisions that the Constitution does not require proportionality -- at least, not in civil proceedings for the forfeiture of property.

In spite of the fact that the Constitution does not require consideration of the owner's fault, Congress has wisely allowed the owner's innocent lack of knowledge of illegal activity to serve as a defense to forfeiture. 21 U.S.C. §§ 881(a)(4)(C), 881(a)(7) (1988). We sincerely hope Congress re-examines § 881 and considers injecting some sort of proportionality requirement into the statute, even though the Constitution does not mandate such a result.

III. CONCLUSION

After reviewing the record de novo, we conclude Austin failed to raise a substantial issue of fact, and summary judgment in favor of the government was appropriate. We also hold the Eighth Amendment does not require that the district court conduct any type of proportionality analysis in a civil forfeiture proceeding. Consequently, we affirm the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

FILED
July 13 1992
William F Clyde
Kmt

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2382SDSF

United States of America, Appellee, vs. One Parcel of Property Located at 508 Depot Street, Garretson, Minnehaha County, South Dakota; with all appurtenances and improvemets thereon; HMET Mobile Home 1972 with Serial Number 0356509G, with appurtenances and improvements thereon, Defendants-Appellants, Richard Lyle Austin, Claimant-Appellant.	*	Appeal from the United States District Court for the District of South Dakota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 20, 1992

accrt copy
7-13-92
7-14-92

A true copy.

Attest: Michael E. Gans
Kmt

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

MANDATE ISSUED 7/9/92

FILED
APR 08 1991
William F Clyde
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- ONE PARCEL OF PROPERTY - LOCATED AT 508 DEPOT STREET, GARRETSON, MINNEHAHA COUNTY, SOUTH DAKOTA, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, and ONE 1972 HMET MOBILE HOME WITH SERIAL NUMBER 035609G, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, Defendants.	*	CIV 90-4133 ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The plaintiff's Motion for Summary Judgment came on for hearing on April 8, 1991, with the plaintiff appearing by Mary T. Wynne and with the claimant appearing by Richard L. Johnson, and

After arguments of counsel and upon the record,

IT IS ORDERED:

(1) That plaintiff's Motion for Summary Judgment is granted.

(2) That the plaintiff may submit a proposed judgment forfeiting the defendants herein pursuant to 21 U.S.C. § 881.

Dated this 8th day of April, 1991.

BY THE COURT:

John B Jones

Chief Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: Deann Tetreault
DEPUTY

(SEAL)

June 18 1991

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, CIV: 90-4133

Plaintiff,

vs. DECREE OF FORFEITURE

ONE PARCEL OF PROPERTY LOCATED AT 508 DEPOT STREET, GARRETSON, MINNEHAHA COUNTY, SOUTH DAKOTA, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, and ONE 1972 HMET MOBILE HOME WITH SERIAL NUMBER 0356509G, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,

Defendants.

---

1. On September 7, 1990, a Verified Complaint for Forfeiture against the defendant located at 508 Depot Street, Garretson, Minnehaha County, South Dakota, with all appurtenances and improvements thereon, and one 1972 HMET mobile home with serial number 0356509G with all appurtenances and improvements thereon, was filed on behalf of the plaintiff, United States of America. The Complaint alleges that the defendant real property more fully described as:

> The West One Hundred Four feet (W 104') of Lots Nineteen (19), Twenty (20) and Twenty-one (21) and the West One Hundred Four feet (W 104') of the North Twenty-six feet (N 26') of Lot Eighteen (18), all in Block Eleven (11) of Royce's Fourth Addition to Garretson, Minnehaha County, South Dakota.

with all appurtenances and improvements thereon, and the 1972 HMET mobile home with serial number 0356509G with all appurtenances and

improvements thereon, were used or intended to be used to commit or to facilitate the commission of a violation of Title II of the Controlled Substances Act, 21 U.S.C. §§ 801 et seq., punishable by more than one (1) year's imprisonment, and are therefore subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a)(7) and (a)(4).

2. It appearing that process was fully issued in this action and returned according to law;

3. That pursuant to a warrant for arrest issued by this Court, the United States Marshal for this District seized said property on September 11, 1990;

4. That on September 11, 1990, Richard Austin was personally served and acknowledged service of the Verified Complaint of Forfeiture, the Warrant of Arrest;

5. That on September 20, 27, and October 4, 1990, notice of this action was published in the Garretson Weekly newspaper;

6. That on September 21, 1990, Richard Austin filed a Claim in this matter, and on October 11, 1990, also filed an Answer.

7. On February 4, 1991, plaintiff filed its Motion for Summary Judgment, Brief in Support thereof, and Affidavit of Donald Satterlee, alleging that the defendant commercial real property was used to facilitate distribution of cocaine, in violation of 21 U.S.C. § 844, et seq., and further alleging that the defendant mobile home was used to facilitate possession of marijuana and cocaine, as well as drug paraphernalia consisting of electronic Ohaus scale, Zig Zag papers, and coke snorter, for the purpose of

distribution in violation of 21 U.S.C. § 844, et seq.. The affidavit sets forth details describing a controlled substance purchase occurring at the commercial property, and a search of the mobile home which disclosed the above described items. Claimant Austin filed his Response to the Motion for Summary Judgment on February 25, 1991.

9. A hearing was held by the Court on April 8, 1991. After review of the arguments of counsel and the file, the Court found no material fact in dispute.

10. The Court entered its Order Granting Summary Judgment to the plaintiff on April 8, 1991.

Now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendant located at 503 Depot Street, Garretson, Minnehaha County, and described as:

> The West One Hundred Four feet (W 104') of Lots Nineteen (19), Twenty (20) and Twenty-one (21) and the West One Hundred Four feet (W 104') of the North Twenty-six feet (N 26') of Lot Eighteen (18), all in Block Eleven (11) of Royce's Fourth Addition to Garretson, Minnehaha County, South Dakota.

with all appurtenances and improvements thereon, and the 1972 HMET mobile home with serial number 0356509G with all appurtenances and improvements thereon, be forfeited to the United States of America and no right, title or interest in the property shall exist in any other party. The defendant property shall be disposed of according to law.

FURTHER ORDERED, ADJUDGED AND DECREED that in accordance with 21 U.S.C. § 853(c), this Order is effective nunc pro tunc to

June 13, 1990, which is the date when the property was used to facilitate a violation of 21 U.S.C. § 881(a)(7) and (a)(4).

Dated this 18th day of ~~May~~ June, 1991.

BY THE COURT:

JOHN B. JONES
District Court Judge

ATTEST:
William F. Clayton, Clerk

By: Linda M. Ziegler
Deputy